

Commentary: District Court Cases

Da Silva v. Vieira, No. 6:20-cv-1301-Orl-37GJK, 2020 U.S. Dist. LEXIS 174167 (M.D. Fla. Sep. 23, 2020)

Other District Court Cases

Adkins v. Adkins,
No. 19-cv-05535-HSG, 2020 U.S. Dist. LEXIS 207559 (N.D. Cal. Nov. 5, 2020)

Wan v. Debolt,
No. 20-cv-3233, 2020 U.S. Dist. LEXIS 197996 (C.D. Ill. Oct. 26, 2020)

Jacquety v. Baptista,
19 Civ. 9642 (VM), 2020 WL 5946562 (S.D.N.Y. Oct. 7, 2020)

Trott v. Trott,
No. 20-CV-1392 (AMD) (CLP), 2020 U.S. Dist. LEXIS 151818 (E.D.N.Y. Aug. 21, 2020)

Leon v. Ruiz,
No. MO:19-CV-00293-RCG, 2020 U.S. Dist. LEXIS 43758 (W.D. Tex. Mar. 13, 2020)

Cunningham v. Cunningham,
237 F. Supp. 3d 1246 (M.D. Fla. 2017)

Marquez v. Castillo,
72 F. Supp. 3d 1280 (M.D. Fla. 2014)

Custody Rights | Grandparent's Custody Rights | Ne Exeat | Immigration Status | Grave Risk

In this case, a mother wrongfully removed her three children from Brazil under the pretense of visiting family, violating the father's custody rights. He and his mother, the children's paternal grandmother who had court-ordered visitation rights, filed a petition for return under the 1980 Hague Convention. The father argued that his incarceration in Brazil for theft-related offenses did not deprive him of the exercise of his ne exeat custody rights, which he had demonstrated by objecting to the mother's removal of the children to the United States.

Holdings

The district court held that the paternal grandmother's court-ordered visitation rights were not enforceable custody rights under the 1980 Convention, but because of the father's ne exeat parental rights under Brazilian law, he did not forfeit his custody rights despite frequent incarceration. The court also held that the mother failed to establish her proffered defenses of delay and grave risk and ordered the children returned to Brazil.

Facts

All parties were Brazilian citizens, including the paternal grandmother and the children (aged eight, nine, and ten). The parents divorced in 2014. On one occasion after the divorce, the mother and father argued when he was returning the children from a visit. The argument escalated, and he kicked the mother in the leg. She pressed charges, and he was convicted of assault and sentenced to three months in jail. Later, he was convicted of auto theft and burglary and served another three years in prison. While the father was incarcerated, the mother obtained full custody of the children. But the father's parental rights were not terminated, and the children spent substantial time with their paternal grandmother. The Brazilian court ratified a written agreement between the mother and the paternal grandmother that set forth the terms of these visits. The grandmother had the children on alternate weekends and some holidays and was able to see the children's school schedules and participate in school

activities. She also paid child support to the mother. Under the agreement, the mother retained exclusive guardianship of the children.

In December 2017, the mother petitioned the Brazilian court for permission to visit family in Orlando, Florida. The father opposed the request, fearing that the mother would refuse to return the children to Brazil, but the court approved the mother's travel plans. The father appealed. In the intervening months, the father was shot while committing a burglary, leading to his apprehension. He was sentenced to two years in prison. While in prison, he continued to write letters to the children, and they continued to visit their grandmother. The Brazilian court order that permitted the mother to visit Florida with the children was affirmed on appeal, and they left for the United States on February 12, 2019. She did not return to Brazil with the children. On July 22, 2020, seventeen months after the children were removed from Brazil, the father and grandmother filed a Hague petition for return.

Discussion

Custody Rights. The agreement between the mother and the grandmother authorizing visits with the children granted the grandmother a right of access but not a right of custody. Although the father lost physical custody rights of the children during his incarceration, he retained *ne exeat*¹ parental rights under Brazilian law and could lawfully object to the children's removal to the United States. Finding that the children had been wrongfully removed from Brazil, the court held that the father established a *prima facie* case for their return.

Well-Settled Defenses. The mother alleged that the children were well settled in the United States and should not be returned to Brazil. The court disagreed, noting that the children changed schools and residences during their time in the United States. The court considered the children's immigration status a weighty factor in determining whether they were settled:

They have overstayed their tourist visas and while they have applied for asylum, their applications have not been approved nor is there any indication their applications are meritorious. . . . Being subject to removal at any time contradicts being "settled" no matter how pleasant their current living situation. Given the Mother's efforts to prevent the Children's contact with their Brazilian family, the change of schools and residences, and, particularly, the Children's uncertain immigration status, the Mother has not met her burden of showing the Children are settled in the U.S.²

Grave Risk Defense. The mother argued that the father's criminal history militated against returning the children. The court disagreed, finding that his criminal history did not involve the children and there was no reason to suspect that a return would threaten their safety. The earlier single incident of assault against the mother did not sufficiently demonstrate a grave risk to the children.

1. *Abbott v. Abbott*, 560 U.S. 1 (2010). The Court held that a *ne exeat* order confers a right of custody to the left-behind parent, entitling that parent to maintain an action under the Convention. A *ne exeat* order typically restrains one or both parents from removing a child from the jurisdiction of the court, or from moving a child across an international frontier without the permission of the other parent or a court. Usually this right is not absolute, and if permission to remove the child is unreasonably withheld, or a court determines that good cause for continued restraint no longer exists, a court of competent jurisdiction may vacate the *ne exeat* order.

2. *Da Silva v. Vieira*, No. 6:20-cv-1301-Orl-37GJK, 2020 U.S. Dist. LEXIS 174167, at *15–16 (M.D. Fla. Sep. 23, 2020) (footnotes omitted).